

UNITED STATES DISTRICT COURT

Northern District of California

San Francisco Division

NADA PACIFIC CORP.,

No. C 13-04325 LB

Plaintiff,

v.

**ORDER GRANTING BESSER'S
MOTION FOR SUMMARY
JUDGMENT**

POWER ENG'G AND MFG., LTD., et al.,

[Re: ECF No. 71]

Defendants.

AND RELATED COUNTER- AND CROSS-
CLAIMS

INTRODUCTION

In this action, several entities sued each other after a microtunnel boring machine broke down while it was boring an underground tunnel on a construction project for the San Francisco Public Utilities Commission ("SFPUC"). Plaintiff Nada Pacific Corporation ("Nada") leased and operated the machine as a subcontractor for the project's general contractor, and Defendant/counter-defendant Besser Company ("Besser") manufactured a component in the machine. Besser moves for summary judgment against Nada on three grounds: (1) Nada is judicially estopped from arguing that Besser's allegedly defective component caused the boring machine to fail because Nada argued before a dispute resolution board established by its general contractor's contract with the SFPUC that site conditions caused the machine to fail; (2) alternatively, Nada cannot use the collateral source rule to obtain a duplicate recovery of the amounts it recovered from its general contractor for the same

1 damages it seeks in this case; and (3) alternatively, Nada has put forth evidence of only its economic
 2 losses and thus the economic loss rule bars its tort claims. Upon consideration of the parties' papers
 3 and their arguments at the November 6, 2014 hearing, the court holds that (1) judicial estoppel does
 4 not apply because the dispute resolution board did not decide the dispute, (2) Nada's potential
 5 recovery is offset by the money it recovered from its general contractor, and the collateral source
 6 rule does not apply, and (3) the economic loss rule bars Nada's tort claims against Besser. The court
 7 thus **GRANTS** Besser's motion.

8 **STATEMENT**

9 **I. THE PARTIES AND THE PROJECT**

10 This case arises out of the September 2010 failure of a microtunnel boring machine ("MTBM")
 11 while it was boring an underground tunnel on a construction project referred to as the San Francisco
 12 Public Utilities Commission-Alameda Siphon Project No. 4, in Alameda County, California (the
 13 "Project"). Joint Statement of Undisputed Facts ("JSUF"), ECF No. 71-2 at 2.¹ The owner of the
 14 Project was the SFPUC, and the general contractor on the Project was Steven P. Rados, Inc.
 15 ("Rados"). *Id.* Nada, a licensed general engineering contractor specializing in microtunnelling
 16 construction projects, acted as a microtunneling subcontractor to Rados on the Project. *Id.*

17 To perform its work as a tunneling subcontractor on the Project, Nada leased an MTBM from
 18 third-party defendant, Akkerman, Inc. ("Akkerman"). *Id.* Because the leased MTBM had a 74"
 19 diameter and the Project required a 96" diameter, Nada separately leased an "increase kit" from
 20 non-party Walter C. Smith Co., Inc. to enlarge the diameter of the face of the MTBM to the required
 21 project dimensions. *Id.* at 2-3. Nada also installed on the leased MTBM a "cutter head" that Nada
 22 owned. *Id.* at 3. The cutter head is the front-most piece of an MTBM, which rotates to bore through
 23 the ground. *Id.*

24 The leased MTBM contained a planetary gearbox designed and manufactured by defendant and
 25 cross-claimant Power Engineering and Manufacturing, Ltd. ("PEM"). *Id.* The PEM gearbox
 26 contained a cast iron planetary carrier manufactured by Besser, which Besser sold to PEM for
 27

28 ¹ Citations are to the Electronic Case File with pin cites to the electronically generated page numbers at the top of the page.

1 \$952.00, plus a \$25 pallet and box charge, in September 2008. *Id.*

2 **II. THE MTBM'S IMMOBILAZATION, RESCUE, AND INVESTIGATION**

3 In September of 2010, while Nada was operating the MTBM to bore a tunnel on the Project, the
4 MTBM became immobilized underground. *Id.* The immobilization occurred roughly 254 feet into
5 tunnel bore, and 12 lengths of 20-foot interconnected steel casing pipe had been installed behind the
6 MTBM when it became immobilized. *Id.* With Nada unable to advance the MTBM forward or
7 move it backwards because of the pipe sections that had been installed behind the MTBM, a rescue
8 shaft (or "911 shaft") was constructed above the MTBM to expose it and then raise it out of the
9 ground with a crane. *Id.* at 3-4.

10 After the MTBM was removed from the ground, it was sent to Nada's facility in Caruthers,
11 California for examination and repair. *Id.* at 4. Upon examination, Nada discovered that the
12 gearbox within the MTBM was cracked. *Id.* Nada subsequently obtained a replacement gearbox,
13 performed other repairs to the MTBM, returned the MTBM to the site, lowered it into the tunnel
14 bore alignment, restored the earthen cover removed to create the 911 shaft, and re-launched the
15 MTBM on the Project, which Nada was then able to complete. *Id.*

16 The failed gearbox was sent to PEM's facility where a non-destructive inspection was performed
17 on or about November 16, 2010. *Id.* The Besser-manufactured planetary carrier within the gearbox
18 then was sent to the University of Northern Iowa ("UNI") in Cedar Falls, Iowa, where it underwent
19 destructive testing on or about February 28, 2011 at PEM's request. *Id.* Based on that destructive
20 testing, UNI prepared a report dated March 31, 2011. *Id.* Structural Integrity Associates, Inc. then
21 prepared a report dated April 12, 2011, which analyzed the UNI report. *Id.* Both reports were
22 available to Nada prior to the Dispute Review Board proceeding discussed below. *Id.*

23 **III. NADA'S REQUEST FOR CHANGE ORDER**

24 In connection with the costs Nada incurred to rescue and repair the immobilized MTBM, Nada
25 submitted a Request for Change Order to Rados on September 6, 2011 and Rados passed that
26 Request for Change on to the SFPUC. *Id.* Nada's Request for Change sought compensation for
27 additional costs as follows:
28

Item	Date of Work	Description of Work	Extended Costs
A	Sept 21, 2010 to Sept 24, 2010	Additional Costs related to Initial Lockup of Mtbm Cutter Bit and efforts to free Mtbm	\$ 144,061.23
B	Sept 27, 2010 to Oct 7, 2010	Additional Costs incurred during installaiton of Recovery Shaft	\$ 266,847.06
C	Oct 8, 2010 to Oct 13, 2010	Additional Costs - NPC Shop Repairs to Mtbm	\$ 264,304.75
D	Oct 8, 2010 to Oct 14, 2010	Additional Costs incurred during Mtbm Repairs and Relaunching Mtbm.	\$ 152,130.39
E	Sept 25, 2010 to Dec 1, 2010	SPR Additional Costs for support to Install, Maintain and Close Recovery Shaft	\$ 308,047.13
F	Sept 8th, 2010 to Nov 8th, 2010	Additional Costs associated with Microtunneling due to the DSC's	\$ 343,339.77
Requested for Change - Total Costs			\$ 1,478,730.33

Id. at 5.

IV. THE DISPUTE REVIEW BOARD PROCEEDINGS

After the SFPUC refused to execute a change order on Nada's Request for Change, the SFPUC, Rados, and Nada, in accordance with the prime contract between the SFPUC and Rados, submitted the dispute to a Dispute Review Board ("DRB"). *Id.* The DRB, which was established by the prime contract between the SFPUC and Rados and whose purpose was "to assist the parties by facilitating the timely resolution of disputes relating to" work on the Project, consisted of one member selected by the SFPUC, one member selected by Rados, and a third member selected by the other two members. *Id.*, Ex. G ("DRB Specification"), ECF No. 71-9 ¶¶ 1.1, 2.3. Each DRB member was required to hold a certification or pre-qualification from the Dispute Resolution Board Foundation or the American Arbitration Association evidencing that the member received training the DRB process and meets the requirements for DRB members. *Id.* ¶ 3.2.

The DRB review process proceeds as follows. Either party to the prime contract could initiate the DRB's review of a dispute. *Id.* ¶ 7.2. The DRB then sets deadlines for the parties to provide pre-hearing submittals, which are position papers supported by evidence, and for a hearing. *Id.* ¶ 7.3, 7.4. The pre-hearing submittal contains a brief statement of the dispute, a summary of the party's position and the basis and justification for that position (with reference to contractual language and other evidence), and cost details. *Id.* ¶ 7.4.

The DRB then conducts a formal hearing that is attended by the parties. *Id.* ¶ 2.2. Attorneys are

1 not allowed to attend the DRB hearing without prior written approval, and if they are granted such
2 approved, they may only observe. *Id.* ¶ 8.4. The party who referred the dispute to the DRB presents
3 its position first, followed by the other party. *Id.* ¶ 8.5. Both parties are then allowed successive
4 rebuttals until the DRB believes that all aspects of the dispute have been fully and fairly covered.
5 *Id.* The DRB members may ask questions, request clarification, or ask for additional information.
6 *Id.* Either party may request that the DRB direct a question to, or request a clarification from, the
7 other party, although the DRB will not allow one party to be directly questioned by the other party.
8 *Id.* The DRB, in its sole discretion, may allow the introduction of arguments, exhibits, handouts, or
9 documentary evidence that were not included in a party's pre-hearing submittal or were not
10 previously given to the other party. *Id.* In the latter circumstance, the other party is given time to
11 review the new material and prepare a rebuttal. *Id.* With prior disclosure, a party may also offer an
12 analysis of an outside expert. *Id.* ¶¶ 8.8, 8.9. In difficult or complex cases, the DRB may find an
13 additional hearing to be necessary. *Id.* at ¶ 8.5.

14 After the formal hearing, the DRB issues a nonbinding, written recommendation (the "DRB
15 Report"), which is admissible in subsequent litigation or other dispute resolution proceedings. *Id.* ¶
16 2.5. The recommendation in the DRB Report is based on the pertinent contractual provisions,
17 applicable laws and regulations, and facts and circumstances of the dispute. *Id.* ¶ 9.1. It includes an
18 explanation of the DRB's reasoning in reaching the recommendation. *Id.* The recommendation
19 must be consistent with the application provisions of the prime contract between the SFPUC and
20 Rados. *Id.* Within 10 days of receiving the DRB Report, either party may request clarification or
21 reconsideration. *Id.* ¶¶ 9.5, 9.6. Within 30 days of receiving the DRB Report, the parties must
22 submit their written acceptance or rejection of the recommendation contains within it. *Id.* ¶ 9.7. In
23 the event that the DRB process does not result in a resolution of the dispute, Rados must comply
24 with the certified claim requirements set forth in the prime contract and with the San Francisco
25 Administrative Code and other applicable laws. *Id.* ¶ 10.1.

26 In accordance with the procedures outlined above, the parties submitted a factual record of
27 "Common Reference Documents" relevant to the Project and the MTBM's immobilization. JSUF,
28 ECF No. 71-2 at 5. On November 14, 2011, Nada submitted a Pre-Hearing Submittal to the DRB,

1 executed by Nada's president, Cal Terassas, explaining Nada's position as to the cause of the
 2 MTBM's immobilization (essentially, site conditions). *Id.* Nada also provided an Appendix of
 3 separate documents to the DRB. *Id.* Among other analyses and reports provided in the Appendix,
 4 Nada provided the DRB with expert reports authored by David Mathy and David Bennett, "two very
 5 respected industry professionals who devote their careers to geotechnical issues and most
 6 substantively to microtunnelling." *Id.* Nada also created PowerPoint presentations that it submitted
 7 to the DRB on November 28, 2011 and in rebuttal on December 1, 2011, after the DRB's hearing.
 8 *Id.* at 6.

9 The DRB conducted a hearing on November 29, 2011 and issued its recommendation on January
 10 6, 2012. *Id.* The DRB's decision made recommendations concerning Nada's entitlement to the
 11 costs requested in Nada's Request for Change. *Id.*

12 **V. THE SETTLEMENT OF THE CHANGE ORDER DISPUTE**

13 As a result of the DRB's January 6, 2012 recommendation, the SFPUC agreed to pay Rados the
 14 sum of \$850,000. JSUF, ECF No. 71-2 at 6. Rados then agreed to pay Nada \$481,755.49 (\$850,000
 15 less deductions for a \$350,000 Rados back charge and \$18,244.51 in DRB charges). *Id.* Nada's
 16 final progress billing to Rados reflects a line item credit of \$850,000 to Nada and debits for the
 17 Rados back charge and DRB costs for net billing of \$481,755.49 and a net balance due under the
 18 Nada-Rados subcontract of \$847,383.74. *Id.* Rados paid Nada the \$847,383.74 outstanding on the
 19 subcontract by check dated July 10, 2012. *Id.* The \$850,000 credit (and net payment of
 20 \$481,755.49) that Nada received from Rados compensated Nada for no costs other than the costs
 21 categorized as items A-F on the chart shown above. *Id.*

22 Nada has no obligation—existing, inchoate, contingent, or otherwise—to repay either Rados or
 23 the SFPUC for the \$850,000 credit or \$481,755.49 net payment that Nada received in settlement of
 24 its Request for Change. *Id.* Nada did not purchase insurance or pay insurance premiums to either
 25 Rados or the SFPUC in exchange for the credit and payment it received in settlement of its Request
 26 for Change. *Id.* at 6-7.

27 **VI. THE DAMAGES NADA SEEKS IN THIS LITIGATION**

28 In this litigation, Nada seeks to recover the following categories of costs in the amounts shown

below:

Item	Date of work	Description of Work	Costs Incurred
A	September 21, 2010 to September 24, 2010	Costs related to initial lockup of MTBM cutter bit and efforts to free MTBM	\$144,061.23
B	September 27, 2010 to October 7, 2010	Costs incurred during installation of recovery shaft	\$266,847.06
C	October 8, 2010 to October 12, 2010	NPC shop repairs to MTBM	\$246,346.89
D	October 8, 2010 to October 14, 2010	Costs incurred during MTBM repairs and relaunching MTBM	\$152,130.39
E	September 25, 2010 to December 1, 2010	Costs incurred for support to install, maintain and close recovery shaft	\$308,047.13
F	October 15, 2010 to October 22, 2010	Additional costs incurred during relaunch of MTBM	\$252,122.07
		Total	\$1,369,554.84

Id. at 7. The categories and amounts of costs listed in items A-F of Nada's damages disclosures are identical to the categories and amounts of costs listed in items A-F of Nada's Request for Change as summarized in the previous chart, except that Nada deducted from item C of Nada's damage disclosures costs that Nada incurred for cutter head repairs and deducted from item F additional costs that Nada incurred after the MTBM had been re-launched. *Id.*

VII. NADA'S CLAIMED PROPERTY DAMAGE

For purposes of California's economic loss rule, Nada claims that it suffered four items of damage to property other than the MTBM as a result of the MTBM's immobilization:

First, Nada claims that it suffered damage to the cutter head in that the MTBM's immobilization caused the cutter head to be "effectively 'lost' underground unless and until the MTBM could be rescued." *Id.* at 7-8.

Second, Nada claims that it suffered damage to the pipe lengths installed in the tunnel at the time the MBTM failed in that the MTBM's immobilization caused the pipe lengths to be "effectively

1 'lost' underground unless and until the MTBM could be rescued since they could not be used for
2 their intended purpose (or any purpose)." *Id.* at 8.

3 Third, Nada claims that it suffered damage to its "license to use the property of SFPUC" in that
4 "Nada was unable to use its contractual license to use the real property owned by SFPUC unless and
5 until the MTBM could be rescued, and Nada had a contractual duty to promptly remedy and/or
6 repair the immobilized MTBM's interference with the tunnel profile." *Id.*

7 Fourth, and finally, Nada claims that it suffered damage to its "lease obligations to Walter C.
8 Smith and Akkerman" in that "when the MTBM became immobilized due to a gear box failure, the
9 MTBM that Nada had leased from Akkerman, and the increase kit that Nada had leased from Walter
10 C. Smith, were effectively 'lost' underground unless and until the MTBM, and the attached increase
11 kit could be rescued." *Id.*

12 Nada claims no other elements of damage to "other property" within the meaning of California's
13 economic loss rule. *Id.*

14 **VIII. PROCEDURAL HISTORY**

15 Nada filed its original complaint, which named only Besser as a defendant, on September 18,
16 2013. Nada Original Complaint, ECF No. 1. On October 4, 2013, Nada filed its First Amended
17 Complaint, which added PEM as a defendant. Nada Complaint, ECF No. 6. Against Besser, Nada
18 brings claims for strict liability based on a manufacturing defect, negligence in the context of
19 products liability, equitable indemnity, fraud, and negligent misrepresentation. *See id.* ¶¶ 43-87.

20 On September 11, 2014, Besser filed the instant motion for summary judgment. Motion, ECF
21 No. 71. Nada filed an opposition on September 25, 2014, and Besser filed a reply on October 2,
22 2014. Opposition, ECF No. 84; Reply, ECF No. 89. The court held a hearing on the matter on
23 November 6, 2014. 11/6/14 Minute Order, ECF No. 100.

24 **ANALYSIS**

25 **I. THE SUMMARY JUDGMENT LEGAL STANDARD**

26 The court must grant a motion for summary judgment if the movant shows that there is no
27 genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of
28 law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Material

1 facts are those that may affect the outcome of the case. *Anderson*, 477 U.S. at 248. A dispute about
 2 a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for
 3 the non-moving party. *Id.* at 248-49.

4 The party moving for summary judgment bears the initial burden of informing the court of the
 5 basis for the motion, and identifying portions of the pleadings, depositions, answers to
 6 interrogatories, admissions, or affidavits which demonstrate the absence of a triable issue of material
 7 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To meet its burden, “the moving party
 8 must either produce evidence negating an essential element of the nonmoving party’s claim or
 9 defense or show that the nonmoving party does not have enough evidence of an essential element to
 10 carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz*
 11 *Companies, Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000); *see Devereaux v. Abbey*, 263 F.3d 1070, 1076
 12 (9th Cir. 2001) (“When the nonmoving party has the burden of proof at trial, the moving party need
 13 only point out ‘that there is an absence of evidence to support the nonmoving party’s case.’”) (quoting *Celotex*, 477 U.S. at 325).

14
 15 If the moving party meets its initial burden, the burden shifts to the non-moving party to produce
 16 evidence supporting its claims or defenses. *Nissan Fire & Marine Ins. Co., Ltd.*, 210 F.3d at 1103.
 17 The non-moving party may not rest upon mere allegations or denials of the adverse party’s evidence,
 18 but instead must produce admissible evidence that shows there is a genuine issue of material fact for
 19 trial. *Devereaux*, 263 F.3d at 1076. If the non-moving party does not produce evidence to show a
 20 genuine issue of material fact, the moving party is entitled to summary judgment. *Celotex*, 477 U.S.
 21 at 323.

22 In ruling on a motion for summary judgment, inferences drawn from the underlying facts are
 23 viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith*
 24 *Radio Corp.*, 475 U.S. 574, 587 (1986).

25 **II. JUDICIAL ESTOPPEL**

26 Besser first argues that Nada should be judicially estopped from asserting any of its claims
 27 against Besser because its factual allegations and theory of recovery in this action contradict the
 28 factual allegations and theory of recovery that it presented to the DRB and which led to a settlement

1 in its favor. *See* Motion, ECF No. 71 at 7, 9-16. If Nada is estopped from asserting its current
 2 theory, then it will not be able to prove that the cast iron planetary carrier manufactured by Besser
 3 caused the harm for which it seeks relief, and therefore its claims against Besser necessarily fail.
 4 *See id.* at 7, 16.²

5 Federal law on judicial estoppel governs cases in federal courts regardless of whether they
 6 involve state law claims. *Johnson v. Oregon Dep't of Human Res. Rehab. Div.*, 141 F.3d 1361,
 7 1364 (9th Cir. 1998); *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 603 (9th Cir.
 8 1996). Judicial estoppel is an equitable doctrine that prevents a party from benefitting by taking one
 9 position but then later seeking to benefit by taking a clearly inconsistent position. *Hamilton v. State*
 10 *Farm Fire & Cas. Ins. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). It “applies to positions taken in the
 11 same action or in different actions,” *Samson v. NAMA Holdings, LLC*, 637 F.3d 915, 935 (9th Cir.
 12 2010) (citing *Rissetto*, 94 F.3d at 603)), and is intended to protect the integrity of the judicial process
 13 by preventing a litigant from “playing fast and loose with the courts,” *Russell v. Rolfs*, 893 F.2d
 14 1033, 1037 (9th Cir. 1990). “It also ‘applies to a party’s stated position whether it is an expression
 15 of intention, a statement of fact, or a legal assertion.’” *Samson*, 637 F.3d at 935 (quoting *Wagner v.*
 16 *Prof'l Eng'rs in California Gov't*, 354 F.3d 1036, 1044 (9th Cir. 2004)).

17 Judicial estoppel may be invoked by the court at its discretion. *Morris v. California*, 966 F.2d
 18 448, 453 (9th Cir. 1991). Several factors help determine whether judicial estoppel applies.
 19 *Hamilton*, 270 F.3d at 782 (citing *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)). “‘First,
 20 a party’s later position must be ‘clearly inconsistent’ with its earlier position.’” *Id.* (quoting *New*
 21

22 ² A party may assert the doctrine of judicial estoppel in a motion for summary judgment to
 23 bar a claim based on an inconsistent position. *See Elston v. Westport Ins. Co.*, 253 Fed. Appx. 697,
 24 699 (9th Cir. 2007) (affirming the district court’s grant of summary judgment against plaintiff on the
 25 basis that her claims were barred by judicial estoppel). A party seeking to defeat summary judgment
 26 on judicial estoppel grounds must “sufficiently explain” a prior judicial position that is inconsistent
 27 with an essential element of its claim. *See Cleveland v. Policy Management Systems Corp.*, 526
 28 U.S. 795, 806 (1999) (a party must “provide a sufficient explanation” for a prior inconsistent
 position to defeat summary judgment); *Fewer v. Copper & Brass Sales, Inc.*, 183 Fed. Appx. 696,
 696 (9th Cir. June 9, 2006) (“Because Fewer failed to ‘proffer a sufficient explanation’ to the district
 court for these inconsistent positions, the court did not abuse its discretion applying the doctrine of
 judicial estoppel.”).

1 *Hampshire*, 532 U.S. at 750). Second, the party must have “‘succeeded in persuading a court to
 2 accept that party’s earlier position.”’ *Id.* at 782 (quoting *New Hampshire*, 532 U.S. at 750). “‘Third,
 3 the party seeking to assert an inconsistent position would derive an unfair advantage or impose an
 4 unfair detriment on the opposing party if not estopped.”’ *Id.* (quoting *New Hampshire*, 532 U.S. at
 5 751). These factors, however, are not “‘inflexible prerequisites or an exhaustive formula”’ because
 6 “‘[a]dditional considerations may inform the doctrine’s application in specific factual contexts.”’ *Id.*
 7 (quoting *New Hampshire*, 532 U.S. at 751). For example, another factor that has been considered is
 8 whether the party to be estopped acted inadvertently or with an intent to defraud the court or
 9 creditors. *Johnson*, 141 F.3d at 1369 (“If incompatible positions are based not on chicanery, but
 10 only on inadvertence or mistake, judicial estoppel does not apply.”); see *Samson*, 637 F.3d at 935.

11 But before the court applies these (and other) factors, it must determine whether judicial estoppel
 12 can be applied when the allegedly inconsistent position was taken before the DRB. The Ninth
 13 Circuit has made clear that the doctrine of judicial estoppel applies not only where prior inconsistent
 14 statements were made to a court, but also where those statements were made in an administrative
 15 proceeding. See *Rissetto*, 94 F.3d at 604 (noting that “[t]hough called judicial estoppel, the doctrine
 16 has been applied, rightly in our view, to proceedings in which a party to an administrative
 17 proceeding obtains a favorable order that he seeks to repudiate in a subsequent judicial proceeding”
 18 and holding that “the doctrine of judicial estoppel is not rendered inapplicable in this case by the fact
 19 that plaintiff’s prior position was taken in a workers’ compensation proceeding rather than in a
 20 court”); see also *Smith v. Montgomery Ward & Co.*, 388 F.2d 291, 291 (6th Cir. 1968) (workers’
 21 compensation proceeding); *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F. Supp.
 22 2d 1152, 1184-85 (C.D. Cal. 2008) (California inheritance tax appraiser); *Simo v. Home Health &*
 23 *Hospice Care*, 906 F. Supp. 714, 718 (D.N.H. 1995) (Social Security Administration disability
 24 proceeding); *UNUM Corp. v. United States*, 886 F. Supp. 150, 158 (D. Me. 1995) (Maine Bureau of
 25 Insurance approval proceeding); *Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Auth.*,
 26 731 F. Supp. 747, 750 (E.D. La. 1990) (Interstate Commerce Commission proceeding). And at least
 27 one court has applied the doctrine where the inconsistent position was taken before the United States
 28 Patent and Trademark Office. See *Synopsys, Inc. v. Magma Design Automation, Inc.*, C 04–3923

1 MMC, 2007 WL 322353, at *25-26 (N.D. Cal. Jan. 31, 2007) (applying the doctrine with respect to
 2 prior statements made to the U.S. Patent and Trademark Office); *cf. Lampi Corp. v. Am. Power*
 3 *Prods., Inc.*, 228 F.3d 1365, 1377 (Fed. Cir. 2000) (stating that “we are troubled by the
 4 inconsistencies between [the plaintiff’s] statements to the PTO . . . and the position taken by [the
 5 plaintiff] in this litigation,” but ultimately affirming the decision not to judicially estop the plaintiff
 6 where the district court found that the plaintiff’s inconsistencies were inadvertent). “This rule has
 7 been justified on the ground that ‘[t]he truth is no less important to an administrative body acting in
 8 a quasi-judicial capacity than it is to a court of law.’” *Rissetto*, 94 F.3d at 604 (quoting *Muellner v.*
 9 *Mars, Inc.*, 714 F. Supp. 351, 357 (N.D. Ill. 1989)).

10 Besser cites many of these opinions and argues that the DMB proceeding likewise is a “quasi-
 11 judicial” proceeding such that judicial estoppel may be applied. *See* Reply, ECF No. 89 at 8-9. The
 12 court disagrees. It is true that the DRB proceeding had many of the hallmarks of a judicial or quasi-
 13 judicial-proceeding: it was adversarial; the parties submitted briefs making arguments and citing to
 14 evidence; the parties could respond to each other’s arguments; the parties could submit the opinions
 15 of experts; etc. But it lacked the most important hallmark—the ability to make a decision.³ In all of

17
 18 ³ Although there does not appear to be an opinion holding that judicial estoppel applies only
 19 to instances where the prior, allegedly inconsistent position was taken before a quasi-judicial body
 20 that has decision-making authority, opinions in other contexts certainly suggest that the ability to
 21 make a decision is critical to determining whether that body is acting in quasi-judicial capacity. *See*
 22 *United States v. MacDonald*, 585 F.2d 1211, 1212 (4th Cir.1978) (recognizing in the double
 23 jeopardy context that a military, investigatory hearing which did not adjudicate the defendant’s guilt
 24 or innocence but rather offered only a recommendation to the Commanding Officer as to the charges
 25 against the defendant did not permit jeopardy to attach); *Eaton v. Siemens*, No. CIV. S-07-315 FCD
 26 KJM, 2007 WL 1500724, at *3-6 (E.D. Cal. May 23, 2007) (finding that an arbitrator’s “advisory
 27 decision” (i.e., a recommendation) to a city manager for his use in deciding plaintiff’s appeal of the
 28 termination of his employment did not bar under res judicata the plaintiff’s subsequent action in
 district court); *Darnell v. Lloyd*, 395 F. Supp. 1210, 1214 n.4 (D. Conn. 1975) (recognizing that
 federal common law rules of preclusion apply only to state administrative decisions that are “judicial
 in nature” and that the administrative hearing was not “an adversary proceeding in which the
 Commissioner was empowered to adjudicate rights of the parties before him” but rather, the hearing
 was an “advisory proceeding designed to help the Commissioner make his decision”); *cf. Lambert v.*
Andrews, 2003 WL 22508205, at *1 (9th Cir. Oct. 31, 2005) (finding that the Nevada State
 Personnel Commission “clearly act[ed] in a judicial capacity” because, among other reasons, the
 Commission’s decision was “binding on both parties”).

the opinions cited above, the deliberative bodies all had the power to make a decision. The workers' compensation appeals board in *Rissetto* approved the plaintiff's claim for disability benefits. 94 F.3d at 600. The Workmen's Compensation Commission in *Smith* did the same thing. 388 F.2d at 292. The California inheritance tax appraiser in *Milton H. Greene Archives* made a determination of the decedent's residence, assessed the amount of inheritance tax to be paid, and submitted a report to the superior court (which could then approve or reject the decision in that report). 568 F. Supp. 2d at 1185. The Social Security Administration in *Simo* awarded the plaintiff permanent disability benefits. 906 F. Supp. at 716. The Maine Bureau of Insurance in *UNUM* approved the plaintiff's proposed conversion from a mutual insurance company into a stock insurance company. 886 F. Supp. at 156. The Interstate Commerce Commission in *Zapata Gulf Marine* granted the assignor's petition to discontinue a tariff investigation. 731 F. Supp. 748-49. And the United States Patent and Trademark Office in *Synopsys* issued two patents that were applied for. 2007 WL 322353, at *17.

The DRB had no such power. Instead, it was empowered "to assist the parties by facilitating the timely resolution of disputes" and was limited to issuing a nonbinding (albeit written) recommendation that the SFPUC, Rados, and Nada could accept or reject. DRB Specification, ECF No. 71-9 ¶¶ 1.1, 2.5, 9.7. The DRB Specification itself even recognized that possibility that the DRB process might not result in a resolution of the dispute. *Id.* ¶ 10.1. If the DRB process itself might not result in a resolution of the dispute, it certainly cannot be considered to have adjudicated it. Besser cites no authority holding, or even suggesting, that the doctrine of judicial estoppel may be applied in the context of a body with no power to make a decision that is binding on the parties before it. Without it, and after considering the authority on this issue, the court will not judicially estop Nada from asserting its claims against Besser.⁴

III. COLLATERAL SOURCE RULE

Besser next argues that Nada's potential recovery must be offset by the money is received from the settlement with the SFPUC and Rados. *See* Motion, ECF No. 71 at 16-20. Besser asserts that

⁴ Because the court finds that the doctrine of judicial estoppel does not apply in this context, the court has no occasion to address the parties' arguments about whether the judicial estoppel factors support its exercise here.

1 because Nada (according to Nada's own calculations) received \$680,627.07 from Rados (which
 2 received the payment from SFPUC), it is limited to recovering \$688,927.70 from Besser in this
 3 action. *See* Reply, ECF No. 89 at 11.⁴ Nada contends that its potential recovery is not so limited
 4 because California's so-called "collateral source rule" applies here. *See* Opposition, ECF No. 84 at
 5 18-22.

6 Normally, a plaintiff is "entitled to no more than a single recovery for each distinct item of
 7 compensable damages supported by the evidence," "[r]egardless of the nature and number of legal
 8 theories advanced by the plaintiff." *Tavaglione v. Billings*, 4 Cal. 4th 1150, 1158-59 (1993) (citing
 9 *Shell v. Schmidt*, 126 Cal. App. 2d 279, 291 (Cal. Ct. App. 1954)). Thus, "[d]ouble or duplicative
 10 recovery for the same items of damage amounts to overcompensation and is therefore prohibited."
 11 *Id.* at 1159 (citing *Shell*, 126 Cal. App. 2d at 291). But under the collateral source rule, "if an
 12 injured party receives some compensation for his injuries from a source wholly independent of the
 13 tortfeasor, such payment should not be deducted from the damages which the plaintiff would
 14 otherwise collect from the tortfeasor." *Helfand v. S. Cal. Rapid Transit Dist.*, 2 Cal. 3d 1, 6 (1970).

15 In *Helfand*, the plaintiff was injured by a tortfeasor during an automobile collision. *Id.* at 4. The
 16 plaintiff sued the tortfeasor and asserted damages that included his medical expenses. *Id.* at 5. The
 17 tortfeasor wanted to introduce evidence showing that the plaintiff's medical insurance carrier paid
 18 about 80% of the plaintiff's medical bills and that other insurance carriers may have paid for some
 19 of the rest. *Id.* Based on this evidence, the tortfeasor argued that the collateral source rule did not
 20 apply and thus the money that the plaintiff sought to recover from him should be offset by the
 21

22 ⁴ In its motion, Besser argued that, because the SFPUC paid \$850,000 to Rados (which in
 23 turn paid \$481,755.49 to Nada because Rados deducted \$350,000 for a back charge and \$18,244.51
 24 in DRB charges), Nada's recovery in this action must be offset by \$850,000 and thus was limited to
 25 \$519,554.77. *See* Motion, ECF No. 71 at 17, 19-20. In its opposition, Nada argued that the amount
 26 of any offset was disputed issue of material fact and stated that not all of the \$850,000 was
 27 duplicative of amounts it claims in this action. *See* Opposition, ECF No. 84 at 21. It further stated
 28 that only \$680,627.07 of the \$850,000 was received for damages that Nada also claims in this action,
 leaving a potential recovery of at least \$688,927.70. *See id.* at 22. In its reply, to avoid the disputed
 issue of material fact, Besser adopted Nada's calculations and argued that Nada's recovery in this
 action is limited to \$688,927.70. *See* Reply, ECF No. 89 at 11. Neither party mentioned this issue
 at the hearing.

1 money that the plaintiff received from his insurance carriers. *Id.*

2 The superior court rejected the tortfeasor's argument, and the California Supreme Court affirmed
3 that decision. *Id.* at 14. In concluding that the collateral source rule did in fact apply to this
4 situation, the Court reasoned that the plaintiff "received benefits from his medical insurance
5 coverage only because he had long paid premiums to obtain them." *Id.* at 9. "Such an origin," the
6 court found, "constitute[s] a completely independent source." *Id.* It went on to note that application
7 of the collateral source rule in this situation "embodies the venerable concept that a person who has
8 invested years of insurance premiums to assure his medical care should receive the benefits of his
9 thrift." *Id.* at 9-10. When this is the case, "[t]he tortfeasor should not garner the benefits of his
10 victim's providence." *Id.* at 10. The Court further explained that this application of the collateral
11 source rule was supported by public policy considerations:

12 The collateral source rule expresses a policy judgment in favor of encouraging
13 citizens to purchase and maintain insurance for personal injuries and for other
14 eventualities. Courts consider insurance a form of investment, the benefits of which
15 become payable without respect to any other possible source of funds. If we were to
16 permit a tortfeasor to mitigate damages with payments from plaintiff's insurance,
17 plaintiff would be in a position inferior to that of having bought no insurance,
18 because his payment of premiums would have earned no benefit. Defendant should
19 not be able to avoid payment of full compensation for the injury inflicted merely
20 because the victim has had the foresight to provide himself with insurance.

21 *Id.* For these reasons, the Court "reaffirm[ed] our adherence to the collateral source rule in tort cases
22 in which the plaintiff has been compensated by an independent collateral source—such as insurance,
23 pension, continued wages, or disability payments—for which he had actually or constructively . . .
24 paid or in cases in which the collateral source would be recompensed from the tort recovery through
25 subrogation, refund of benefits, or some other arrangement." *Id.* at 13-14.

26 Besser rightly points out that this case has none of the characteristics of the cases in which the
27 collateral source rule has been applied. "While commonly applied to exclude evidence of insurance
28 payments, over the years, a variety of benefits provided to plaintiffs have been held to be collateral
sources of compensation that should not be considered in mitigation of a plaintiff's damages."
Smock v. State, 138 Cal. App. 4th 883, 886-87 (Cal. Ct. App. 2006) (citing *Helfend*, 2 Cal. 3d at 9-
14 (medical insurance benefits); *Fifield Manor v. Finston*, 54 Cal. 2d 632, 637 (1960) (value of
gratuitous medical services); *McKinney v. California Portland Cement Co.*, 96 Cal. App. 4th 1214,

1 1220 (Cal. Ct. App. 2002) (social security and pension benefits); *Arambula v. Wells*, 72 Cal. App.
 2 4th 1006, 1008 (Cal. Ct. App. 1999) (continued wages paid by an employer); *Pac. Gas & Elec. Co.*
 3 *v. Superior Court*, 28 Cal. App. 4th 174, 176-177 (Cal. Ct. App. 1994) (fidelity insurance proceeds);
 4 *Hanif v. Housing Authority*, 200 Cal. App. 3d 635, 644 (Cal. Ct. App. 1988) (value of home care
 5 provided by a child's parents); *Rodriguez v. McDonnell Douglas Corp.*, 87 Cal. App. 3d 626, 662
 6 (Cal. Ct. App. 1978) (value of nursing services provided by a spouse); *Tremeroli v. Austin Trailer*
 7 *Equip. Co.*, 102 Cal. App. 2d 464, 482 (Cal. Ct. App. 1951) (continued wages paid by an
 8 employer)). Besser also cites an opinion that suggests that additional money paid to a contractor
 9 pursuant to a change order does not constitute money from a collateral source, although this opinion
 10 does not discuss the issue in detail. *See Huber, Hunt & Nichols, Inc. v. Moore*, 67 Cal. App. 3d 278,
 11 304 (Cal. Ct. App. 1977).

12 For its part, Nada cites no authority holding or even suggesting that the collateral source rule
 13 should be applied in the circumstances present here. Instead, it relies on *Helfand* for its general
 14 summary of the collateral source rule—that “if an injured party receives some compensation for his
 15 injuries from a source wholly independent of the tortfeasor, such payment should not be deducted
 16 from the damages which the plaintiff would otherwise collect from the tortfeasor,” 2 Cal. 3d at
 17 6—but it ignores both the facts of that case and the Court's express limitation of its holding, *see id.*
 18 at 6 n.3 (“There are many sorts of collateral sources and a great variety of contexts in which the
 19 ‘rule’ might be applied. We expressly do not consider or determine the appropriateness of the rule's
 20 application in the myriad of possible solutions which we have not discussed or which are not
 21 presented by the facts of this case.”); *see also Arambula*, 72 Cal. App. 4th at 1010-11 (noting that
 22 the California Supreme Court specifically limited *Helfand*'s holding to the facts of that case and
 23 stating that *Helfand* thus should be construed narrowly); *Kirtland & Packard v. Superior Court*, 59
 24 Cal. App. 3d 140, 145 (Cal. Ct. App. 1976) (recognizing that the California Supreme Court
 25 “expressly disavowed any intent to extend the collateral source rule beyond the particular facts of
 26 *Helfand*”).

27 It also tries to analogize this case to *Helfand* by arguing that the SFPUC and Rados cannot be
 28 considered “other tortfeasors” for purposes of the collateral source rule and were “wholly

independent” from Besser (the alleged tortfeasor) because SFPUC and Rados had to pay Nada Pacific pursuant to California Public Contracts Code § 7104. That statute provides:

Any public works contract of a local public entity which involves digging trenches or other excavations that extend deeper than four feet below the surface shall contain a clause which provides the following:

(a) That the contractor shall promptly, and before the following conditions are disturbed, notify the local public entity, in writing, of any:

(1) Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law.

(2) Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders prior to the deadline for submitting bids.

(3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

(b) That the local public entity shall promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work shall issue a change order under the procedures described in the contract.

(c) That, in the event that a dispute arises between the local public entity and the contractor whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in the contractor's cost of, or time required for, performance of any part of the work, the contractor shall not be excused from any scheduled completion date provided for by the contract, but shall proceed with all work to be performed under the contract. The contractor shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the contracting parties.

Cal. Pub. Contracts Code § 7104. In other words, Nada Pacific received money from the SFPUC and Rados under statutory/contract theory, not a tort theory.

Even so, the larger point is that the facts of this simply are different from the situations where courts have applied the collateral source rule. Nada was not “compensated by an independent collateral source—such as insurance, pension, continued wages, or disability payments—for which he had actually or constructively . . . paid,” and the SFPUC will not be “recompensed from the tort recovery through subrogation, refund of benefits, or some other arrangement.” *Helfand*, 2 Cal. 3d at 13-14. As explained in *Helfand*, the collateral source rule is a limited exception to the more general

1 rule against duplicate recoveries, and the court does not believe that the rule applies here. To the
 2 extent that Nada tries to come within *Helfand* by arguing that it “constructively ‘paid’ for the right
 3 to receive [the additional compensation that Rados received under the change order] by promising to
 4 perform, and actually performing, its work under [its subcontract with Rados],” *see* Opposition, ECF
 5 No. 84 at 20, it provides no evidence to support this assertion.

6 Accordingly, the court finds that Nada is limited to recovering \$688,927.70 from Besser in this
 7 action.

8 **IV. ECONOMIC LOSS RULE**

9 Finally, Besser argues that California’s so-called “economic loss rule” bars the tort claims that
 10 Nada brings against it. *See* Motion, ECF No. 71 at 20-23.

11 In California, “[t]he economic loss rule requires a purchaser to recover in contract for purely
 12 economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond
 13 a broken contractual promise.” *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 988
 14 (2004). “Economic loss consists of damages for inadequate value, costs of repair and replacement
 15 of the defective product or consequent loss of profits—without any claim of personal injury or
 16 damages to other property.” *Id.* (internal citations and ellipses omitted). Under the rule, a plaintiff
 17 may recover in tort only where he or she can allege personal injury or “damage to ‘other property,’
 18 that is, property *other than the product itself*.” *Jimenez v. Superior Court*, 29 Cal.4th 473, 482-83
 19 (2002) (emphasis in original). “The function of the economic loss rule is to prevent tort law from
 20 shifting back to sellers a specific risk that better rests with buyers—the risk that a product will not
 21 perform to a particular level beyond that warranted by the seller. If a buyer desires protection
 22 against this risk, she can and should negotiate for a higher warranty or seek it out from other sellers
 23 in the marketplace.” *Robinson*, 34 Cal.4th at 997 (2004) (Werdegar, J., dissenting) (citing *Seely v.*
 24 *White Motor Co.*, 63 Cal. 2d 9, 18-19 (1965)).

25 Nada asserts only tort claims against Besser, and through this action it seeks only economic
 26 damages that cannot be recovered through them. It is undisputed that the damages to “other
 27 property” that Nada seeks are based on its inability to use the MTBM’s cutter head, the pipe lengths
 28 installed in the tunnel behind the MTBM, its “license to use the property of SFPUC,” and its “lease

obligations to Walter C. Smith and Akkerman” while the MTBM was stuck underground. Nada cites several opinions that make clear that, to avoid the economic loss rule, the damage to “other property” must be physical damage. *See, e.g., Jimenez*, 29 Cal. 4th at 482-83; *County of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 320 (Cal. Ct. App. 2006); *KB Home v. Superior Court*, 112 Cal. App. 4th 1076, 1084 (Cal. Ct. App. 2003); *see also City of Pomona v. SQM N. Am. Corp.*, 70 F.3d 1036, 1050 (9th Cir. 2014) (economic loss rule did not bar the plaintiff’s claims where the plaintiff alleged physical damage (contamination) to its groundwater). It also cites several opinions holding that the “loss of use” of “other property” does not constitute physical damage to it; instead, it constitutes an economic loss. *See Anthony v. Kelsey-Hayes Co.*, 25 Cal. App. 3d 442, 447 (Cal. Ct. App. 1972) (the defendant’s defective wheels, which were installed in the plaintiff’s trucks, made the trucks unuseable and resulted in a business loss; the court affirmed the Superior Court’s determination that the plaintiff’s loss of use of the trucks was an economic loss for which the plaintiff must recover under contract law); *see also Casden Builders Inc. v. Entre Prises USA, Inc.*, No. CV 10-2353 ODW (CWx), 2010 WL 2889496, at *3-4 (C.D. Cal. July 21, 2010) (the defendant’s defective product, which was installed in the plaintiff’s climbing wall, rendered the wall inoperable; the court applied California’s economic loss rule, concluded that the plaintiff’s loss of use of its climbing wall was an economic loss, and dismissed with prejudice the plaintiff’s tort claim); *W./Scott Fetzer Co. v. Braden Partners, LP*, No. C-03-4114 VRW, 2006 WL 2263827, at *5 (N.D. Cal. Aug. 7, 2006) (the defendant’s defective valve allowed oxygen in the plaintiff’s oxygen cylinders to escape, causing a business loss; the court noted that California’s economic loss rule “is intended to ensure that redress for lost property alone, unaccompanied by collateral harm, may only be sought under contract law,” found that the loss of the oxygen did not constitute physical harm to it, and entered summary judgment in the defendant’s favor on the plaintiff’s negligence claim); *cf. N. Am. Chem. Co. v. Superior Court*, 59 Cal. App. 4th 764, 777 n.8 (Cal. Ct. App. 1997) (“Although purely economic loss usually occurs in the form of lost profits, it may also include consequential damages, loss of expected proceeds, lost opportunities, diminution in the value of the allegedly defective property, the costs of repair and replacement, loss of use, loss of goodwill, and damages paid to third parties as a result of a defendant’s negligence.”).

1 With the exception of *W./Scott Fetzer*, Nada ignores the authorities cited by Besser. *See*
2 Opposition, ECF No. 84 at 22-29. As for *W./Scott Fetzer*, Nada says that the escaped oxygen at
3 issue there was gone forever, while here it contends that the “other property” was “physically
4 restrained and/or blocked.” *Id.* at 23. The court fails to see a meaningful distinction; in both
5 instances, the “other property” was made unusable.

6 Nada also cites *Catalyst Old River Hydroelectric Ltd. P’ship v. Ingram Badge Co.*, 639 F.3d 207
7 (5th Cir. 2011), where the plaintiff, the owner of a hydroelectric station, suffered damages after the
8 defendant’s boat caused a collision which in turn caused less water to flow into the plaintiff’s
9 station. *Id.* at 209. Because less water flowed into the station, the plaintiff produced less electricity
10 than usual. *Id.* The plaintiff brought tort claims against the defendant to recover damages for the
11 value of the electricity that it was not able to generate. *Id.* at 210. The Fifth Circuit found that the
12 plaintiff’s tort claims were not barred by the economic loss rule. *Id.* at 211, 214. But the ruling is
13 inapposite because in *Catalyst*, the Fifth Circuit was applying the economic loss rule under federal
14 maritime law. *See id.* at 210. That rule states that “there can be no recovery for economic loss
15 absent physical damage to or an invasion of a proprietary interest.” *Id.* (citing *Robins Dry Dock &*
16 *Repair Co. v. Flint*, 275 U.S. 303, 308-09 (1927); *Louisiana ex. rel. Guste v. M/V TESTBANK*, 752
17 F.2d 1019, 1029 (5th Cir. 1985)) (emphasis added). California’s economic loss rule is narrower than
18 the federal maritime one because the California rule does not allow recovery for the invasion of a
19 proprietary interest. Instead, as discussed above, it requires physical damage.

20 In addition, Nada cites *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal. App.
21 4th 847, 866 (Cal. Ct. App. 2000), for its statement that “California courts have held that the
22 presence of something where it should not be can constitute property damage.” Opposition, ECF
23 No. 84 at 28. But, as Besser points out, *Shade* is inapposite because the court there was construing
24 the meaning of “property damage” as defined in an insurance policy. That opinion says nothing
25 about physical damage to “other property” for purposes of the economic loss rule. Nada also cites
26 *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875, 877-84 (1997), for its statement that
27 “courts have also found other instances of a piece of ‘other property’ being physically harmed when
28 the defective product caused the ‘other property’ to be physically prevented from being used as

intended.” Opposition, ECF No. 84 at 28. This opinion also is inapposite because there, the “other property” was lost at sea when a ship sank; the “other property” was physically destroyed. *See Saratoga Fishing*, 520 U.S. at 877 (“This case asks us how [the economic loss rule under federal maritime law] treats the physical destruction of” other property).⁵

Finally, Nada argues that, even if the economic loss rule bars its claims against Besser for strict liability, negligence, equitable indemnity, and negligent misrepresentation, it does not bar its claim for fraud. Opposition, ECF No. 84 at 22. Nada makes this argument in a single sentence in its opposition, stating that “the courts have held that the economic loss rule does not bar fraud and intentional misrepresentation claims.” *Id.* (citing *Robinson*, 34 Cal. 4th at 991). But as Besser correctly notes, *Robinson* does not state for such a broad proposition. In *Robinson*, the plaintiff made helicopters, and the defendant made clutches that the plaintiff incorporated into its helicopters. 34 Cal. 4th at 985. According to the parties’ contract, the defendant was supposed to ground the clutches to a particular level of hardness. *Id.* The plaintiff needed them ground to this hardness because its “type certificate” from the Federal Aviation Administration (“FAA”) required it. *Id.* When the defendant made and sold the clutches to the plaintiff, the defendant included along with the clutches a certificate stating that the clutches were ground to the required hardness. *Id.* at 985-86. At a certain point, the defendant started grinding the clutches to a different hardness—in violation of the parties’ contract—but it still issued certificates stating that the clutches were ground to the required hardness. *Id.* at 986. It turned out that the clutches ground to the nonconforming hardness had a much higher failure rate than those ground to the conforming hardness. *Id.*

When the plaintiff found out what happened, it sued the defendant for breach of contract, breach of warranty, and negligent and intentional misrepresentation. *Id.* at 987. The defendant argued that the plaintiff’s tort claims were barred by the economic loss rule, but the California Supreme Court

⁵ Nada also cites *Tasion Comm’cns, Inc. v. Ubiquiti Networks, Inc.*, No. C-13-1803 EMC, 2013 WL 4530470, at *6 (N.D. Cal. Aug. 26, 2013) for its discussion of the factors used to determine whether property is “other property” for purposes of the economic loss rule. That discussion, however, presupposed that the “other property” had been physically damaged; the radios at issue there were physically damaged as a result of the defendant’s defective cables. *See id.* at *2, *7.

1 concluded otherwise. *See id.* at 988-93. What allowed the claims to survive was the fact that they
 2 were based not on the defendant's provision of clutches that did not conform to the contract but
 3 instead was based on the defendant's continued certification that the clutches were conforming when
 4 it knew they were not. *See id.* at 990-91. As the Court explained:

5 . . . By issuing false certificates of conformance, [the defendant] unquestionably made
 6 affirmative representations that [the plaintiff] justifiably relied on to its detriment.
 7 But for [the defendant's] affirmative misrepresentations by supplying the false
 8 certificates of conformance, [the plaintiff] would not have accepted delivery and used
 9 the nonconforming clutches over the course of several years, nor would it have
 10 incurred the cost of investigating the cause of the faulty clutches. Accordingly, [the
 11 defendant's] tortious conduct was separate from the breach itself, which involved [the
 12 defendant's] provision of the nonconforming clutches. In addition, [the defendant's]
 13 provision of faulty clutches exposed [the plaintiff] to liability for personal damages if
 14 a helicopter crashed and to disciplinary action by the FAA. Thus, [the defendant's]
 15 fraud is a tort independent of the breach. (*Erlich v. Menezes, supra*, 21 Cal. 4th at pp.
 16 553–554, 87 Cal. Rptr. 2d 886, 981 P.2d 978.)

17 We hold the economic loss rule does not bar [the plaintiff's] fraud and intentional
 18 misrepresentation claims because they were independent of [the defendant's] breach
 19 of contract. (*See Erlich v. Menezes, supra*, 21 Cal. 4th at pp. 552–554, 87 Cal. Rptr.
 20 2d 886, 981 P. 2d 978.)

21 *Id.* (footnote omitted). In a footnote accompanying its holding, the Court further explained that

22 . . . [i]n contrast [to cases dealing with the economic loss rule in products liability or
 23 negligence contexts], [the plaintiff's] claims are based on [the defendant's]
 24 intentional and affirmative misrepresentations that risked physical harm to persons.
 25 [The plaintiff's] helicopters are flown by and carry people. A properly functioning
 26 sprag clutch is vital to the safe performance of the aircraft, and compliance with the
 27 certificate requirement is part of an integrated regulatory scheme intended to ensure
 28 their safe operation. The economic loss rule is designed to limit liability in
 commercial activities that negligently or inadvertently go awry, not to reward
 malefactors who affirmatively misrepresent and put people at risk.

29 *Id.* at n.7. Careful not to extend the economic loss rule too far, the Court went on to make clear that
 30 its holding “is narrow in scope and limited to a defendant's affirmative misrepresentations on which
 31 a plaintiff relies and which expose a plaintiff to liability for personal damages independent of the
 32 plaintiff's economic loss.” *Id.* at 993; *United Guar. Mortg. Indem. Co. v. Countrywide Fin. Corp.*,
 33 660 F. Supp. 2d 1163, 1183 (C.D. Cal. Oct. 5, 2009) (noting *Robinson's* narrow and limited
 34 holding).

35 Here, Nada does not allege that Besser made any affirmative misrepresentations on which it
 36 relied, nor does it allege that it was exposed to liability for personal damages independent of the its
 37 economic loss. Without having done so, Nada cannot fit within *Robinson's* narrow and limited

1 holding.

2 Accordingly, the court concludes that the economic loss rule applies and bars Nada's tort claims
3 against Besser.

4 **CONCLUSION**

5 Based on the foregoing, the court **GRANTS** Besser's motion for summary judgment.

6 **IT IS SO ORDERED.**

7 Dated: November 10, 2014



8 LAUREL BEELER
9 United States Magistrate Judge